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No. 83-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,

Petitioner,

vs.

ATLANTIC RICHFIELD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF OF INDEPENDENT OIL AND TIRE CO., *et al.*, AS *AMICI CURIAE*

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IN THE

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EASTERN AIR LINES, INC.,

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vs.

ATLANTIC RICHFIELD COMPANY,

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ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF OF INDEPENDENT OIL AND TIRE CO., *et al.*, AS *AMICI CURIAE*

Independent Oil and Tire Co., Shepherd Brothers Service Stations, and U.S. Oil Company, Inc., hereby submit the following brief as *amici curiae*.[1]

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[1] Pursuant to Supreme Court Rule 36.1, the consent of both parties to file the instant brief is attached hereto as Appendix A.

I. STATEMENT OF ISSUE PRESENTED ON APPEAL AND BRIEFED BY *AMICI CURIAE*

Amici curiae address the following issue on petition for writ of certiorari:

Whether prejudgment interest should be awarded to private plaintiffs in actions brought pursuant to Section 210 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904 note ("ESA"), as incorporated into the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.* ("EPAA").

For the following reasons, *amici curiae* respectfully urge this Court to grant the petition of Eastern Air Lines, Inc. ("Eastern") for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States.

II. INTERESTS OF *AMICI CURIAE*

Historically, *amici curiae* have purchased petroleum products at wholesale from refiners and then resold such products both to wholesale and retail purchasers. Because the refiner-suppliers charged prices for petroleum products in excess of the maximum allowable prices under the Mandatory Petroleum Price Regulations, 10 C.F.R. Parts 210-212 ("Price Regulations"), *amici curiae*, like Eastern, have filed private suits under Section 210 of the ESA to recover price overcharges arising from purchases of petroleum products during the period of price controls. These cases include the following:

Independent Oil and Tire Co. v. Marathon Oil Company, No. C82-382 (N.D. Oh.)

Coleman Shepherd d.b.a. Shepherd Brothers Service Stations v. Powerine Oil Company, No. CV-80-827 RJK (C.D. Calif.).

U.S. Oil Co., Inc. v. Koch Refining Company, et al., No. 79-C-659 (E.D. Wis.).

In each of the foregoing cases, the plaintiff purchaser alleges that the defendant supplier violated the Price Regulations and thereby exceeded the maximum allowable prices in sales of petroleum products to the plaintiff. Like the present action on petition to this Court, each case seeks the award of prejudgment interest. The guidance this Court may provide concerning the proper standards to be used by federal courts in awarding prejudgment interest to private plaintiffs under the ESA and other federal statutes, therefore, will affect the potential recovery of *amici curiae* in the above actions.

III. SUMMARY OF ARGUMENT

Amici curiae submit that a decision by this Court is necessary to correct the lower court's holding concerning the appropriate standards for the award of prejudgment interest. Consideration of the Court is also needed to set forth clear guidelines for the proper award of prejudgment interest under federal law.

The holding below is contrary to federal precedent that damages need not be liquidated before an award of prejudgment interest is appropriate. *Amici curiae* submit that reversal of the lower court's decision is essential to ensure uniformity in the application of federal law by the courts in this area.

Federal precedent also supports the award of prejudgment interest as an appropriate remedy to injured plaintiffs in price overcharge actions. Two important congressional purposes of the federal statute at issue in this case are the compensation of private plaintiffs for injuries suffered due to overcharges under the Price Regulations, and the encouragement of private enforcement of those regulations. The availability of prejudgment interest en-

courages private actions against violators of federal price controls and reduces the need for enforcement actions by the government. Reversal of the lower court's decision is therefore necessary to uphold the congressional purposes underlying the federal statute.

IV. ARGUMENT

CERTIFICATION SHOULD BE GRANTED IN ORDER TO RESOLVE QUESTIONS OF FEDERAL LAW GOVERNING THE AWARD OF PREJUDGMENT INTEREST

A. THE HOLDING OF THE LOWER COURT IS CONTRARY TO FEDERAL PRECEDENT.

In refusing to award prejudgment interest to Eastern, the court below affirmed the district court's holding that:

> Prejudgment interest is available only where the amounts due are certain or reasonably capable of being ascertained, and is not available where "the sums claimed to be due were uncertain." . . . In the case before us, the sums claimed to be due have remained uncertain throughout the protracted litigation and were not reasonably capable of being ascertained.

(Decision and Order at 51 n.19.) (Citation omitted.) *Amici curiae* submit that this holding is contrary to federal law.

The strict common law rule that interest may only be awarded on liquidated claims has been abandoned by the federal courts. *See, e.g., Funkhouser v. J. B. Preston Co.*, 290 U.S. 163 (1933); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979). As the Court stated in *United States v. Jamison Co.*, 425 F.2d 1281 (6th Cir. 1970):

> Where the amount for which recovery is sought, even though not liquidated, is based upon the readily ascertainable value of services or property,

> the general and better considered rule is to allow interest, at least in the absence of strong equities to the contrary.

Id. at 1284.

This is precisely the situation here. The volume of jet fuel purchased by Eastern from Atlantic Richfield Company ("Arco") during the period of price controls is undisputed. In addition, the formula for calculating maximum allowable prices set forth in the Price Regulations established the measure for Eastern's recovery. The district court looked to Arco's own calculations of cost recoveries on its Department of Energy ("DOE") reporting forms. After disallowing Arco's retroactive reallocation of increased costs, the district court awarded damages to Eastern based upon Arco's computation of overcharges. As the district court noted, "the underlying data" for the overcharges was undisputed. (Decision and Order at 42.) Clearly, damages arising under the Price Regulations are liquidated and ascertainable pursuant to the formula set forth in the Price Regulations.

In other price overcharge actions arising under the Price Regulations, the courts have awarded prejudgment interest to compensate injured parties. In *United States v. Exxon Corp.*, 561 F. Supp. 816, 857-58 (D.D.C. 1983), *appeal docketed*, No. DC-93 (Temp. Emer. Ct. App. July 6, 1983), for example, the court applied the interest rates used by DOE in its enforcement actions and awarded prejudgment interest on overcharges of approximately $895 million. Similarly, in *Dyke v. Gulf Oil Corp.*, No. 77-10-PA, slip op. (D. Or. Aug. 24, 1983), the court, notwithstanding the decision of the Temporary Emergency Court of Appeals in the instant case, awarded prejudgment interest in a private action for overcharges on

the ground that the appropriate amount of damages could be determined with certainty.[2]

When DOE, rather than the overcharged customer, prosecutes an action for price overcharges, DOE exercises its authority to require the supplier to compensate the customer for the loss of the use of funds paid to the supplier as overcharges. As DOE's Enforcement Manual states:

> Where the Department of Energy determines that a person has violated the Mandatory Petroleum Price and Allocation Regulations, it is appropriate that DOE determine the actual (i.e., out of pocket) costs to the victim of such violations. Obviously, the costs to the victim of a violation not only include the amount of the violation, *but also an amount necessary to compensate the victim for the loss of the use of such funds.* Therefore, DOE may require firms found in violation of DOE Price and Allocation Regulations *to calculate an amount representing the interest on the amount of the violations, computed from the date of the violations to the date of restitution*, and will require such firms to add this amount to the violation amounts.

46 Fed. Reg. 21414 (April 10, 1981). (Emphasis added.) The courts have upheld DOE's inclusion of interest in its refund orders as a "rational method to 'make whole' those who have been overcharged." *Bonray Oil Co. v. DOE*, 472 F. Supp. 899, 904 (W.D. Okla. 1978), *aff'd per curiam*, 601, F.2d 1191 (Temp. Emer. Ct. App. 1979). *See also Sauder v. DOE*, 648 F.2d 1341, 1347 (Temp. Emer. Ct. App. 1981).

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[2] A copy of the decision in *Dyke* is attached hereto as Appendix B.

Amici curiae submit that permitting the lower court's ruling to stand without review would confuse existing federal precedent. Clear guidance, therefore, is needed from this Court to ensure uniformity of federal law in this area.

B. IN REFUSING TO AWARD PREJUDGMENT INTEREST, THE LOWER COURT THWARTED CONGRESSIONAL PURPOSES OF THE FEDERAL STATUTE.

The lower court also upheld the ruling of the district court that, under the governing statute, Eastern was not entitled to prejudgment interest with respect to overcharges arising from Arco's sales of jet fuel to Eastern. The district court held that "the statute . . . makes clear that if an overcharge is found to have been unintentional, damages shall be 'limited to the amount of the overcharge.' " (Decision and Order at 51, n.19, citing Section 210(b) of the ESA.)

Amici curiae submit that the court below erred in affirming this holding. Read in its full context, the provision under Section 210(b) of the ESA that "the liability of the defendant shall be limited to the amount of the overcharge" in cases where the defendant shows that the overcharge was not intentional is clearly meant solely as a limitation on the right to recover treble damages. It has no bearing on whether prejudgment interest may be awarded merely as an element of compensation. Indeed, the avilability of prejudgment interest is nowhere addressed in that statute.

In the absence of specific statutory authorization for the award of prejudgment interest, the courts have "fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congres-

sional purpose in imposing them and in light of general principles. . . ." *Rodgers v. United States*, 332 U.S. 371, 373 (1947). Where, as here, the statute was designed to compensate an injured plaintiff, a court's primary consideration is the purpose of the statute and whether an award of prejudgment interest is necessary to make the plaintiff whole. *See, e.g., Bebchick v. Washington Metropolitan Area Transit Commission*, 645 F.2d 1086, 1093 (D.C. Cir. 1981); *Payne v. Panama Canal Co.*, 607 F.2d 155, 166 (5th Cir. 1979); *Lodges 743 and 1746, International Association of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 447 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

In one of the leading cases analyzing the award of prejudgment interest, *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979), the Supreme Court stated: "The major factor permeating these cases allowing prejudgment interest is that such an award is necessary to compensate an injured plaintiff." *Id.* at 883. The compensatory purpose of prejudgment interest is of special importance in this era of extremely high interest rates. During the period of price controls, overcharged customers were deprived of funds for the operation and maintenance of their business as a result of their suppliers' unlawfully high prices. As the court in *Socony Mobil Oil Co. v. Texas Coastal and International*, 559 F.2d 1008 (5th Cir. 1977), stated:

> Prejudgment interest is not awarded as a penalty but is in the nature of compensation for the use of funds. In the instance case the defendants have had the use of the money during the entire period of this protracted litigation, to which the plaintiffs have ultimately been found entitled.

Id. at 1014 (citations omitted). See also *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966); *United States v. Exxon Corp.*, *supra*, at 857-58.

The federal statute at issue, therefore, was intended by Congress to encourage private enforcement of the Price Regulations and to compensate those private plaintiffs injured by overcharges. The ruling of the lower court, which would thwart those goals by denying prejudgment interest to injured private plaintiffs, clearly creates a need for review and guidance on this important issue.

V. CONCLUSION

For the reasons stated above, *amici curiae* submit that this court should grant Eastern's petition for a writ of certiorari to the Temporary Emergency Court of Appeals. Review of the important questions of federal law discussed above is needed to provide guidance to the federal courts with respect to the proper standards for award of prejudgment interest in federal actions.

Respectfully submitted,

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APPENDIX A

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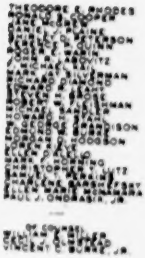

September 13, 1983

Tobey Marzouk, Esquire
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Re: Eastern Air Lines, Inc. v. Atlantic Richfield Co., No. 83-259

Dear Mr. Marzouk:

Pursuant to Rule 36 of the Supreme Court of the United States, this letter will confirm that Atlantic Richfield Company consents to the filing by Independent Oil and Tire Co., Shepherd Brothers Service Stations, and U.S. Oil Company, Inc. of an amicus brief in support of the petition for a writ of certiorari filed by Eastern Air Lines, Inc. in the above-captioned proceeding.

Yours very truly,

Robert E. Jordan, III
Counsel of Record for
Atlantic Richfield Company

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,	)	
	)	
Petitioner,	)	
	)	NO. 83-259
vs.	)	
	)	
ATLANTIC RICHFIELD COMPANY,	)	
	)	
Respondent.	)	
	)	

CONSENT OF PETITIONER
FOR FILING BRIEF OF
AMICI CURIAE IN SUPPORT OF
THE PETITION FOR CERTIORARI

Petitioner Eastern Air Lines, Inc., hereby consents pursuant to Sup. Ct. R. 36 to the filing of a Brief of Amici Curiae in support of Eastern's Petition For A Writ of Certiorari To The Temporary Emergency Court of Appeals of the United States, August 17, 1983, by Amici Curiae Independent Oil and Tire Co., Shepherd Brothers Service Stations and U. S. Oil Company, amici curiae in the Temporary Emergency Court of Appeals.

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APPENDIX B

[Filed AUG 24 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 77-10-PA

RICHARD W, DYKE, dba WESTERN STATIONS CO.,

Plaintiff,

v.

GULF OIL CORPORATION,
a Pennsylvania corporation,

Defendant.

Civil No. 77-791-PA

COLVIN OIL COMPANY, an Oregon corporation,

Plaintiff,

v.

GULF OIL CORPORATION,
a Pennsylvania corporation,

Defendant.

Civil No. 77-849-PA

F.O. FLETCHER, INC., dba FLETCHER OIL COMPANY,

Plaintiff,

v.

GULF OIL CORPORATION,
a Pennsylvania corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO AMEND AND CORRECT FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant moves to amend the Findings of Fact and Conclusions of Law in light of *Eastern Air Lines, Inc. v. Atlantic Richfield,* ___ F.2d ___, Nos. 11-2, 11-3 (TECA June 15, 1983).

The motion to deny an award of attorneys' fees is DENIED for the reasons specified in the Opinion filed August 23, 1983.

The motion to deny an award of prejudgment interest is DENIED because Magistrate Juba was able to determinte appropriate amounts with certainty. Therefore, *Eastern Air Lines* does not control.

IT IS SO ORDERED.

DATED this 24 day of August, 1983.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge